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Opinion following transfer from Supreme Court

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOE RODRIGUEZ,<br><br>Defendant and Appellant. | B287573<br><br>(Los Angeles County Super. Ct. No. BA405944) |

APPEAL from an order of the Superior Court for the County of Los Angeles. Katherine Mader, Judge. Affirmed; petition denied.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Michael C. Keller and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Joe Rodriguez received a sentence of 140 years to life following his conviction of one count of murder, and two counts of attempted murder, for his participation in a gang-related shooting. (*People v. Rodriguez* (Oct. 20, 2016, B265581) [nonpub. opn.].) The trial court denied defendant's postconviction motion for discovery pursuant to Penal Code former section 1054.9,[1] finding that the statute did not apply to defendant, because he was not serving a life sentence without the possibility of parole. Defendant appealed, arguing that his sentence was the functional equivalent of a life sentence without the possibility of parole. In our original opinion in this case, we exercised our discretion to treat his appeal as a petition for writ of mandate, and denied defendant's request for relief, finding that former section 1054.9 did not apply to him under the plain language of the statute.

The California Supreme Court granted review and transferred the case to us with directions to vacate our decision and reconsider the case in light of Assembly Bill No. 1987 (2017-2018 Reg. Sess.). Assembly Bill No. 1987 became effective on January 1, 2019, and expands section 1054.9 to cases "involving a conviction of a serious felony or a violent felony resulting in a sentence of 15 years or more." (Stats. 2018, ch. 482, § 2.)

We again affirm the order denying postconviction discovery, finding former section 1054.9 does not apply to defendant, and that the amendments to section 1054.9 apply prospectively.

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[1] All subsequent citations are to the Penal Code unless otherwise indicated.

## BACKGROUND

We previously affirmed defendant's conviction of first degree murder (§ 187, subd. (a)), and two counts of deliberate, premeditated, and willful attempted murder (§§ 187, subd. (a), 664, subd. (a)), for which he received a sentence of 130 years to life in prison, consisting of 25 years to life for the murder count, doubled due to a strike prior, plus 25 years for firearm and gang enhancements. He also received two consecutive 25-year-to-life terms for the attempted murder counts, plus one 5-year enhancement under section 667, subdivision (a). We modified defendant's sentence, after finding that the abstract of judgment did not properly reflect the imposition of the five-year section 667, subdivision (a) enhancement for one of the attempted murder counts, and that the enhancement was erroneously not applied to the remaining counts for which defendant also received indeterminate sentences, which increased defendant's sentence to 140 years to life. (*People v. Rodriguez*, *supra,* B265581.) Defendant's petition for review was denied by our Supreme Court, and his petition for writ of certiorari was denied by the U.S. Supreme Court.[2]

Following remittitur, defendant filed a motion for discovery under former section 1054.9 in the trial court, "in anticipation of filing a petition for a writ of habeas corpus," seeking evidence in the possession of the prosecuting attorney, such as trial exhibits, forensic evidence, and photographs, among other evidence. The motion acknowledged that the statute allows those sentenced to

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[2] We grant defendant's request that we take judicial notice of our slip opinion in his earlier appeal, remittitur, and the amended abstract of judgment.

death or life without the possibility of parole to seek postconviction discovery to aid them in filing a petition for writ of habeas corpus, but argued that defendant's sentence "is an exaggerated sentence that does not allow [him] the opportunity to parole and is very much equivalent to any other inmate sentenced to death or life without parole." The trial court denied the motion, finding that defendant "is not serving a sentence of life without [the possibility of] parole" which is a "requirement for discovery pursuant to . . . section 1054.9." Defendant appealed.

On September 18, 2018, Assembly Bill No. 1987 was signed by the Governor and filed with the Secretary of State, with an effective date of January 1, 2019. ( Stats. 2018, ch. 482, § 2.) Assembly Bill No. 1987 amended section 1054.9 to extend access to postconviction discovery materials to those convicted "of a serious felony or a violent felony resulting in a sentence of 15 years or more . . . ." (§ 1054.9, subd. (a).) The amended statute also provides "[t]he changes made to this section by the act that added this subdivision are intended to only apply prospectively." (*Id.,* subd. (j).)

We issued our opinion on September 26, 2018, finding that defendant was not entitled to relief, because former section 1054.9 only applied to those sentenced to death or to life without the possibility of parole. Defendant petitioned for review in the California Supreme Court, and the Supreme Court granted review and transferred the case to us with directions to vacate our decision and reconsider the case in light of Assembly Bill No. 1987. The parties submitted supplemental briefs.

## DISCUSSION

As an initial matter, defendant acknowledges that the order appealed from may only be challenged by petition for writ

of mandate. (See § 1054.9; *In re Steele* (2004) 32 Cal.4th 682, 692, fn. 2.) He asks us to exercise our discretion to treat his appeal as a petition for writ of mandate, and to reach its merits. (See *People v. Payne* (1988) 202 Cal.App.3d 933, 936.) In the interest of judicial economy, we will reach the merits of defendant's appeal. (*Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1348-1350.)

**1. Former Section 1054.9**

At the time he made his motion for postconviction discovery, the operative version of section 1054.9 provided, in pertinent part, that "[u]pon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall . . . order that the defendant be provided reasonable access to any of the materials . . . . [¶] . . . in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." (*Id.*, subds. (a), (b); Stats. 2002, ch. 1105, § 1.)

Defendant contends former section 1054.9 applies to defendants serving prison terms which are the functional equivalent of a sentence of life without the possibility of parole, where parole eligibility falls outside of a defendant's natural lifespan. In making this argument, he relies on cases considering whether de facto life sentences for minors constitute cruel and unusual punishment, and cases interpreting Proposition 47 to apply to unenumerated theft offenses. (See, e.g., *People v.*

*Caballero* (2012) 55 Cal.4th 262, 268 [finding that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date falling outside the offender's natural life expectancy constitutes cruel and unusual punishment]; *People v. Martinez* (2018) 4 Cal.5th 647, 657 [discussing breadth of Prop. 47].) These cases have no application here.

The fundamental task in construing a statute is to ascertain the intent of the legislators to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) "If the plain language of the statute is clear and unambiguous, [the courts'] inquiry ends, and [one] need not embark on judicial construction." (*People v. Johnson* (2002) 28 Cal.4th 240, 244.) "In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ." (Code Civ. Proc., § 1858.)

By its plain language, former section 1054.9 applied only to "a case in which a sentence of death or of life in prison without the possibility of parole has been imposed . . . ." (*Id.*, subd. (a).) The statute is unambiguous in limiting its application, and under well-settled principles of statutory construction, we may not read into the statute "de facto" or "functional equivalent" language.

Even if we were to resort to extrinsic aids to help interpret former section 1054.9 (which is not required, because the statute is unambiguous), its legislative history supports our conclusion. When Senate Bill No. 1391 (2001-2002 Reg. Sess.) was originally introduced, proposing the creation of section 1054.9, its discovery provisions were to be available to anyone convicted of a felony. The Attorney General opposed the bill on the basis that it created an unreasonable burden on law enforcement and prosecutors to

maintain files for all felons. Therefore, the legislation was amended to narrow its scope to apply only to inmates sentenced to life without possibility of parole or death. (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 305-306 [discussing legislative history of former § 1054.9].) The Legislature intended a narrow scope; had it intended for the law to apply to de facto life sentences, it would have so provided.

**2. Amendments to Section 1054.9**

In his supplemental brief, defendant admits his conviction is now final, as he exhausted his appeals in 2017. Nevertheless, he contends the amendments to section 1054.9 apply to him, arguing the goal of the legislation was to increase access to discovery for all inmates serving long sentences and seeking to prove their innocence, irrespective of the finality of their convictions. Defendant contends the amendment's statement that it is intended to only apply prospectively is ambiguous "as it does not clarify how the prospective application must be applied, and to say that it was intended to apply only to future inmates receiving qualifying sentences would be inconsistent with the legislative intent to facilitate the habeas process for all men and women who were wrongfully convicted and are currently serving time."

The People contend the amendments to section 1054.9 do not apply to defendant, as his conviction was final before the effective date of the amended statute, and the plain language of the statute provides that it applies prospectively. We agree.

Assembly Bill No. 1987 made a number of changes to section 1054.9, including extending its application to those convicted of serious or violent felonies, serving a sentence of

15 years or more.[3] The amended statute also states that "[t]he changes made to this section by the act that added this

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[3] The amended version of section 1054.9 provides as follows:

"(a) In a case involving a conviction of a serious felony or a violent felony resulting in a sentence of 15 years or more, upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment, or in preparation to file that writ or motion, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (b) or (d), order that the defendant be provided reasonable access to any of the materials described in subdivision (c).

"(b) Notwithstanding subdivision (a), in a case in which a sentence other than death or life in prison without the possibility of parole has been imposed, if a court has entered a previous order granting discovery pursuant to this section, a subsequent order granting discovery pursuant to subdivision (a) may be made in the court's discretion. A request for discovery subject to this subdivision shall include a statement by the person requesting discovery as to whether he or she has previously been granted an order for discovery pursuant to this section.

"(c) For purposes of this section, 'discovery materials' means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

"(d) In response to a writ or motion satisfying the conditions in subdivision (a), the court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical evidence for purposes of

subdivision are intended to only apply prospectively." (*Id.*, subd. (j).)

As noted, *ante*, the plain language of a statute controls, where, as here, the statute is unambiguous. (*People v. Johnson*, *supra*, 28 Cal.4th at p. 244.) The term "prospectively" could not be more clear. It means that an amended statute should not be applied retroactively. (See *People v. Floyd* (2003) 31 Cal.4th 179, 185; see also *In re Estrada* (1965) 63 Cal.2d 740, 747-748.) Ignoring this language would render it surplusage, and would completely drain it of meaning. (*People v. Floyd*, at p. 186.) Therefore, by its plain terms, the amendments to section 1054.9 do not apply to defendant, whose conviction was final long before the effective date of the amendments.

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postconviction DNA testing are provided in Section 1405, and this section does not provide an alternative means of access to physical evidence for those purposes.

"(e) The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant.

"(f) This section does not require the retention of any discovery materials not otherwise required by law or court order.

"(g) In criminal matters involving a conviction for a serious or a violent felony resulting in a sentence of 15 years or more, trial counsel shall retain a copy of a former client's files for the term of his or her imprisonment. An electronic copy is sufficient only if every item in the file is digitally copied and preserved.

"(h) As used in this section, a 'serious felony' is a conviction of a felony enumerated in subdivision (c) of Section 1192.7.

"(i) As used in this section, a 'violent felony' is a conviction of a felony enumerated in subdivision (c) of Section 667.5.

"(j) The changes made to this section by the act that added this subdivision are intended to only apply prospectively."

## DISPOSITION

The order is affirmed; defendant's petition for writ of mandate is denied.

GRIMES, Acting P. J.

WE CONCUR:

WILEY, J.

RUBIN, J.*

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.